

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7316 of 2002

For Approval and Signature:
HON'BLE MR.JUSTICE A.M.KAPADIA

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? |
| 2 | To be referred to the Reporter or not ? |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? |
| 5 | Whether it is to be circulated to the civil judge ? |

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MOHAMADI FIDA ALI RETIWALA (CONTRACTOR) &4 - Petitioner(s)
Versus
KURBAN HUSSAIN INAYATALI KAPADIA &2 - Respondent(s)

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Appearance :

MR. M.R.GOHIL for MR HARIN P RAVAL for Petitioner No(s).: 1.
MR AR MAJMUDAR for Respondent No(s).: 1.

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CORAM :HON'BLE MR.JUSTICE A.M.KAPADIA
Date : 06/07/2005

ORAL JUDGMENT

1. By filing instant petition under Article 227 of the Constitution of India, petitioner seeks to challenge the judgement and order dated 10.7.2005 rendered in Misc. Civil Appeal No. 155 of 2000 by the learned 2nd Joint District Judge, Bharuch, by which the appeal filed by the petitioner has been dismissed and thereby order dated 10.10.2000 recorded below application exh.1 in Misc. Civil Application No. 109 of 1999 by the learned 3rd Joint Civil Judge (SD), Bharuch, rejecting the application filed by the petitioner to set aside the ex parte decree passed against him in Regular Civil Suit No. 171 of 1996, came to be affirmed.
2. The respondent had filed Civil Suit No. 171 of 1996 against the petitioner inter alia contending that the petitioner was settled at Mumbai and the premises which was let out to the petitioner has not been used by the petitioner and therefore decree for eviction of the suit premises was claimed. According to the petitioner summons was not served upon the petitioner. The summons was got affixed on the premises of the petitioner instead of being served upon the petitioner, therefore, he could not remain present in the Court. Thereafter matter proceeded ex parte and the learned Judge who heard the Suit, passed the decree of eviction against the petitioner vide judgement and decree dated 15.4.1998 in Regular Civil Suit No. 171 of 1996, which was not within the knowledge of the petitioner.
3. On 2.11.1999 the respondent filed Regular Execution Petition No. 34 of 1999. For the first time on 18.9.1999 the order was passed for issuing a notice in the said Dharkhast and on coming to know about the same, the petitioner immediately filed Civil Application No. 109 of 1999 in the Court of learned 3rd Joint Civil Judge (SD), Bharuch under Order 9 Rule 13 of the Code of Civil Code ('the Code' for short) for setting aside the ex parte decree. The learned Judge dismissed the said application. Aggrieved thereby the petitioner went in Appeal before the District Court by filing Civil Misc. Appeal No. 155 of 2000 under Order 43 Rule 1 of the Code. The learned 2nd Joint District Judge, Bharuch, heard the Appeal and dismissed the same vide order dated 10.7.2002, which has given rise to the present petition under Article 227 of the Constitution of India, at the instance of the original defendant.
4. Mr. M.R.Gohil, learned advocate of the petitioner contended that summons were not duly served upon the petitioner as required under the Code. It was got affixed on the premises of the petitioner instead of being served upon the petitioner, which has resulted into passing of the ex parte decree. On receipt of summons in Regular Execution Petition No. 34 of 1999, petitioner for the first time came

to know about decree which was passed against him. Thereafter he applied for certified copy and on obtaining the same he has filed the application for setting aside the same under Order 9 Rule 13 of the Code, which was not time barred. However, the learned Civil Judge (SD), Bharuch, has misdirected himself that the applicant has not filed application seeking condonation of delay and therefore, the application under Order 9 Rule 13 of the Code for setting aside ex parte decree was not maintainable. Same is the finding recorded by the learned Joint District Judge which has resulted into miscarriage of justice. Therefore, this Court, in exercise of powers conferred under Article 227 of the Constitution of India, should interfere in the impugned order and thereby to allow the application filed by the petitioner for setting aside the ex parte decree. He, therefore urged that the petition may be allowed.

5. Per contra, Mr. A.R.Majmudar, learned advocate of the respondent, contended that respondent has claimed the decree of eviction of the shops which remained closed permanently and the respondent, at the relevant time was not residing at the given address, therefore, respondent has obtained the order to serve it by affixing on the suit shop which was affixed as per the Bailiff report and therefore summons was duly served. He further contended that this decree was passed on 15.4.1998 and the application for setting aside the ex parte decree was filed on 6.12.1998. Therefore there was a delay of one year and 8 months for which no application was submitted seeking condonation of delay. Therefore the learned Judge has rightly rejected the said application which is affirmed by the learned Joint District Judge. He, therefore urged that no interference is called for in this petition filed under Article 227 of the Constitution of India which confers only supervisory jurisdiction over the lower judiciary. He, therefore urged that the petition lacks merit, deserves to be rejected.
6. This Court has considered the submissions advanced by the learned advocates appearing for the parties, perused the impugned order dated 10.10.2002 recorded below Application exh.1 in Misc. Civil Application No. 109 of 1999 by the learned 3rd Joint District Judge (SD), Bharuch as well as the order dated 10.7.2002 rendered in Misc. Civil Appeal No. 155 of 2000 by the learned 2nd Joint District Judge, Bhaurch and the provisions contained under the Code.
7. So far as the factual matrix is concerned, there is no dispute that respondent is the owner of the premises which was let out to the petitioner. According to the respondent, the petitioner was settled at Mumbai and therefore respondent has filed suit for eviction on the

ground of non-user of the premises for a continuous period of 6 months for the purpose for which it was let out under the provisions of the Bombay Rents Act. Since the petitioner, at the relevant time was residing at Mumbai, respondent got it served by affixing on the premises. Thereafter the trial Court proceeded for hearing. At the conclusion of the hearing, the trial Court passed the decree of eviction against the petitioner vide judgement and decree dated 15.4.1998. Since the petitioner did not comply with the decree of eviction, respondent has filed execution proceedings by filing Regular Execution Petition No. 34 of 1999. On receipt of summons, the petitioner came to know about decree which was passed against him. Thereafter he applied for certified copy and on obtaining the same he has filed the application for setting aside the same under Order 9 Rule 13 of the Code, which was time barred by one year and 8 months. As per Article 123 of the Limitation Act, period of 30 days is prescribed for setting aside ex parte decree.

8. The contention that the petitioner came to know about the decree for the first time when the notice in execution proceedings was served upon him and therefore application filed by him for setting aside the ex parte decree is within the time, has no substance. The petitioner remained out of Bharuch City for number of years and did not remain present during the course of the trial of the suit and allowed the decree to be passed against him and thereafter he also did not take care to know the result of the proceedings which was pending against him.
9. In aforesaid view of the matter, he cannot claim that he had the knowledge of the decree for the first time when he received notice of the execution proceedings.
10. Even if the contention of the petitioner that he came to know about the decree for the first time from the date of receipt of the summons in execution proceedings is accepted, in that case also he ought to have filed application for seeking condonation of delay in filing the application, which the petitioner has not availed of and straightway he has filed application for setting aside the decree under Order 9 Rule 13, therefore the learned trial Judge has very rightly observed that without filing application for condonation of delay, application filed under Order 9 Rule 13 was not tenable. The matter did not rest there. Before appellate Court also there was a delay. Learned 2nd Joint District Judge, Bharuch in para 9 of his judgement has observed that Misc. Civil Application No. 109 of 1999 was disposed of on 10.10.2000 and the Appeal was filed after a period of 30 days, i.e. 15.11.2000, therefore petitioner caused delay in every proceedings.

From the record it appears that the petitioner has awoken from slumber at every proceedings after a long delay.

11. In aforesaid view of the matter, according to this Court, no infirmity or illegality is committed by the learned trial Judge in rejecting the application filed by the petitioner under Order 9 Rule 13 of the Code for setting aside the ex parte decree, which is affirmed by the learned Joint District Judge as according to this Court no other conclusion was possible except the conclusion reached by the trial Court.
12. It is required to be noted that this is a petition filed under Article 227 of the Constitution of India. In the case of Ouseph Mathai and others v/s. M. Abdul Khadir, (2002) 1 SCC 319, Supreme Court has held that the petition filed under Article 227 of the Constitution of India cannot be treated like an extension of a statutory appeal or revision.
13. It is settled principle of law that powers vested in Court under Article 227 of the Constitution of India is a supervisory jurisdiction. The High Court must confine itself to the correcting of error of jurisdiction committed by the Courts below and it cannot assume suo motu jurisdiction of appellate Court and correct every mistake assumed to have been committed by the Courts below. It is a review of the decision making process and not the decision itself. The High Court cannot reappreciate preliminary or perceptive facts found by the fact finding authority under the statute. The aforesaid proposition of law is laid down by the Apex Court in the case of (i) Mohd. Yunus v. Mohd. Mustaqim & others, AIR 1984 SC 38, (ii) Khanna Improvement Trust v. Land Acquisition Tribunal and others (1995) 2 SCC 557 and (iii) H.B. Gandhi v. M/s Gopinath, (1992) Supp. 2 SCC 312 (iv) State of Maharashtra v. Miland and others, (2000) 1 SCC 4.
14. In view of the foregoing discussions according to this Court petition lacks merit, deserves to be rejected.
15. For the foregoing reasons, the petition fails and accordingly it is dismissed with no order as to costs. Rule is discharged. Interim relief granted earlier stands vacated.
16. At this stage Mr. Gohel, learned advocate of the petitioner urged that the ad interim relief granted by this Court, which has remained operative till today, may be further continued for a period of 4 weeks, to enable the petitioner to approach higher forum.
17. The prayer made by Mr. Gohel, learned advocate of the petitioner has been opposed by Mr. A.R. Majmudar, learned advocate for the respondent by contending that since this Court has considered all the submissions advanced by Mr. Gohel, learned advocate of the petitioner

and rejected the same and while rejecting the same this Court has held that petition lacks merit and the petitioner has caused delay at every proceedings and hence ad interim relief may not be continued any further.

18.This Court has considered the prayer made by Mr. Gohel, learned advocate of the petitioner and the objection raised by Mr.

A.R.Majmudar, learned advocate of the respondent. In the facts and circumstances, the prayer made by Mr. Gohel, learned advocate of the petitioner is rejected.

(A.M.Kapadia, J)

Jayanti*